Supreme Court, U.S.
FILED
MAY 8 - 2009
OFFICE OF THE CLERK

No. 081393

In The

Supreme Court of the United States

STEPHEN EDWARD MAY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To Division One Of The Court Of Appeals Of The State Of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Patterson v. New York, 432 U.S. 197, 210 (1977), confirmed that "there are obviously constitutional limits beyond which the States may not go" when defining a crime's elements and its affirmative defenses. In Arizona, the State may convict an individual of child molestation by proving that he intentionally or knowingly touched the genitals of a child. Ariz. Rev. Stat. §§ 13-1401, 1410. To avoid being punished as a child molester, the defendant must raise and prove the affirmative defense that he "was not motivated by a sexual interest." Ariz. Rev. Stat. § 13-1407(E).

The question presented is whether Arizona's child molestation statutes violate an accused's Fourteenth Amendment right to due process because they "manipulate the prosecutor's burden of proof by . . . placing the affirmative defense label on 'at least some elements' of traditional crimes." *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000) (quoting *Patterson*, 432 U.S. at 210).

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Petitioner, Stephen E. May ("May"), respectfully requests that a writ of certiorari issue to review the decision of Division One of the Arizona Court of Appeals in this case.

OPINIONS BELOW

The Arizona Court of Appeals' decision (Pet. App. 1-11) is unreported. The judgment and order of the Superior Court of Maricopa County (Pet. App. 43, 53-54) is unreported.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals issued its decision on July 24, 2008. The Arizona Supreme Court denied review on February 10, 2009. Petitioner invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which

> shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Arizona law are set forth in the appendix to this petition at Pet. App. 27-31.

STATEMENT OF THE CASE

This case questions whether the "constitutional limits" restricting a state's ability to "reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in [its] statutes," *Patterson v. New York*, 432 U.S. 197, 210 (1977), prohibit Arizona from requiring a person prosecuted for child molestation to prove by a preponderance of the evidence that he "was not motivated by a sexual interest," Ariz. Rev. Stat. § 13-1407(E).

A. Arizona's Definition of the Crime of Molestation of a Child

Arizona defines the crime of child molestation as "intentionally or knowingly engaging in . . . sexual contact . . . with a child who is under fifteen years of age." Ariz. Rev. Stat. § 13-1410(A). "Sexual contact" does not require that the contact be accompanied by

any particular mental state or purpose. Rather, "'[s]exual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals [or] anus . . . by any part of the body or by any object." Ariz. Rev. Stat. § 13-1401(2). Thus, conviction requires the State to prove only that the defendant (1) intentionally or knowingly (2) touched the genitals (3) of a child less than fifteen years old.

The statutory scheme makes no exception for parental care, medical care, or other instances of legitimate touching. Instead, Arizona purports to separate innocent touching from criminal conduct by providing that "[i]t is a defense to a prosecution pursuant to § . . . 13-1410 that the defendant was not motivated by a sexual interest." Ariz. Rev. Stat. § 13-1407(E). Section 13-1407(E) is an affirmative defense. *See State v. Getz*, 944 P.2d 503, 506 (Ariz. 1997) (describing defenses in section 13-1407 as affirmative defenses); *State v. Simpson*, 173 P.3d 1027, 1030 (Ariz. Ct. App. 2007) (Pet. App. 19). In Arizona, a defendant bears the burden of proving affirmative defenses by a preponderance of the evidence. Ariz. Rev. Stat. § 13-205(A).

Throughout most of Arizona's history, the State had to prove beyond a reasonable doubt that an accused child molester acted with criminal sexual intent. *See State v. Trenary*, 290 P.2d 250, 252 (Ariz. 1955) (interpreting 1939 version of molestation statute to require proof of sexual interest). Similarly from 1965 until 1993, Arizona's Criminal Code defined the crime of child molestation as "knowingly

molest[ing] a child . . . by directly or indirectly touching the private parts of such child." *See* 1965 Ariz. Sess. Laws Ch. 20, §§ 3, 4. The Arizona Supreme Court held that the word "molest" placed in this version of the statute "[a]n essential element . . . that the acts involved be 'motivated by an unnatural or abnormal sexual interest or intent with respect to children.'" *State v. Brooks*, 586 P.2d 1270, 1272 (Ariz. 1978) (quoting *State v. Berry*, 419 P.2d 337, 340 (Ariz. 1966)); *accord State v. Stinson*, 461 P.2d 472, 473 (Ariz. 1969). In contrast, the current statute, passed in 1993, absolves the State of the need to prove the "essential element" acknowledged in *Trenary*, *Brooks*, *Berry*, and *Stinson* and instead requires the defendant to disprove the fact of sexual motivation to avoid conviction.

B. The Procedural History of May's Case

May was tried on seven counts of child molestation. (*See* Pet. App. 2.) Each count involved an allegation that May briefly and indirectly touched a child over clothing. (Record On Appeal 73.) May asked the court to instruct the jury that "[t]he crime of molestation of a child requires proof beyond a reasonable doubt" that he acted "with the motivation of a sexual interest." (Pet. App. 32-35.) During the jury instructions conference, May's counsel reiterated his position that "the State is obliged to prove a motivation of sexual interest as an element of the offense." (Pet. App. 38; *see also* Pet. App. 43.) The State answered that the law clearly places on May the burden to raise

and prove he was *not* motivated by sexual interest (Pet. App. 39-40), further noting that Arizona courts have upheld the constitutionality of requiring an accused to bear the burden of proof on affirmative defenses (Pet. App. 49-50 (citing *State v. Grell*, 135 P.3d 696, 702 (Ariz. 2006), and *State v. Sanderson*, 898 P.2d 483, 491 (Ariz. Ct. App. 1995))). More specifically, the State summarized its position by stating, "There is no element in the crime of child molestation regarding sexual motivation. Affirmative defenses are still viable in Arizona law; lack of sexual motivation is one of those defenses. The defendant constitutionally carries the burden of proving lack of sexual motivation by a preponderance of the evidence." (Pet. App. 51.)

The judge agreed with the State and issued final jury instructions that placed the burden of disproving sexual motivation on the defendant:

> MOLESTATION OF A CHILD
>
> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of fifteen years. It is a defense to child molestation that the defendant was not motivated by a sexual interest.
>
> AFFIRMATIVE DEFENSE
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of molestation of a child. The burden of proving each element of the offense beyond a reasonable doubt

> always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence you must find the defendant not guilty of the offense of molestation of a child.

(Pet. App. 53-54.) After extensive deliberations, during which the jury twice told the judge they were deadlocked, the jury returned guilty verdicts on five counts. (Pet. App. 2-3.) May received five consecutive fifteen-year sentences for a total of seventy-five years. (Pet. App. 3.)

May appealed to the Arizona Court of Appeals, arguing, among other things, that the jury instructions impermissibly relieved the State of its burden to prove every element of the charged crimes beyond a reasonable doubt and thus violated the due process principle articulated in *In re Winship*, 397 U.S. 358, 364 (1970). (May's Ariz. Ct. App. Opening Br. 16.) The State asserted that the current version of the statute defining child molestation did not include the element of sexual motivation. (State's Ariz. Ct. App. Answering Br. 15-16); *see* Ariz. Rev. Stat. § 13-1410(A). Therefore, the State argued, it is not unconstitutional to require the defendant to prove the absence of sexual motivation as an affirmative defense. (State's Ariz. Ct. App. Answering Br. 16.)

The Arizona Court of Appeals held that the jury instruction complied with Arizona law, noting that May's argument was rejected by a recently published opinion, *State v. Simpson*, 173 P.3d 1027 (Pet. App. 12-23). (Pet. App. 4.) May petitioned the Arizona Supreme Court for review, again challenging the jury instructions that placed on him the burden to disprove motivation by sexual interest. (May's Ariz. Sup. Ct. Pet. for Review 6.) The Arizona Supreme Court denied review. (Pet. App. 24.)

REASONS FOR GRANTING THE WRIT

This case calls for this Court to resolve a question it has previously deferred: To what extent may the State remove traditional elements from existing crimes and instead require defendants to disprove those same elements as affirmative defenses? Arizona has always punished intentional touching of a child's genitals only upon proof of the "essential element" that the accused's acts were motivated by sexual interest. *See Brooks*, 586 P.2d at 1272. Because the current statutes require a defendant to disprove sexual interest, Arizona now authorizes criminal punishment for every intentional touching of a child's genitals, unless the accused can carry the burden to disprove his sexual intent. Under this scheme, May was given an effective natural life sentence without the State proving beyond a reasonable doubt the very fact that distinguishes innocent and criminal conduct.

The question presented implicates not only the child molestation statutes of four states,[1] but also the prerogative of all fifty states to alter, by legislative fiat, the burden of proof the Constitution imposes in criminal cases. State courts have already reached conflicting decisions regarding the states' authority to reduce the prosecution's burden in child molestation cases. *Compare State v. Tibbetts*, 281 N.W.2d 499, 500-01 (Minn. 1979) (statute requiring proof that touching "can reasonably be construed as being" for a sexual or aggressive purpose unconstitutionally shifted the burden of proof), *with In re Wentworth*, 651 N.W.2d 773, 776 (Mich. Ct. App. 2002) (statute requiring proof that touching "can reasonably be construed as being" for a sexual purpose *did not* unconstitutionally shift the burden of proof). Arizona's statutes present a narrowly focused, timely vehicle for examining the constitutional limits on the states' ability to redefine crimes and reallocate burdens of proof. *See* Sup. Ct. R. 10(c).

---

[1] Mich. Comp. Laws § 750.520a(q) (to establish "sexual contact" the State need prove only that the contact "can reasonably be construed as being" for a sexual purpose); Neb. Rev. Stat. § 28-318 (same); Tenn. Code Ann. § 39-13-501(6) (same).

A. The Court Should Define the Constitutional Limits Identified in *Patterson* Because Arizona Has Manipulated Its Statute So That the State No Longer Must Prove a Fact Necessary for Conviction.

The Constitution requires a state to "try[ ] to a jury all facts necessary to constitute a statutory offense, and prov[e] those facts beyond a reasonable doubt." *Apprendi*, 530 U.S. at 483-84; *In re Winship*, 397 U.S. at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Generally, in determining the necessary elements of a crime, courts defer to state legislatures because the states are "free to choose the elements that define their crimes." *Jones v. United States*, 526 U.S. 227, 241 (1999). "The caveat [is] a stated recognition of some limit upon state authority to reallocate the traditional burden of proof." *Id.* (citing *Patterson*, 432 U.S. at 210). But despite repeated assurances that constitutional limits exist on states' ability "to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," this Court has left those limits undefined. *Patterson*, 432 U.S. at 210; *see Harris v. United States*, 536 U.S. 545, 557 (2002) (plurality opinion); *Apprendi*, 530 U.S. at 486; *Jones*, 526 U.S. at 241; *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (all acknowledging but not defining the limits identified in *Patterson*).

In *Apprendi*, the Court invalidated a so-called "sentencing enhancement" because the fact in question was "the functional equivalent of an element of a greater offense." 530 U.S. at 469, 494 & n.19. The Court noted that the statute at issue in that case did not present a question "concerning the State's power to manipulate the prosecutor's burden of proof . . . by placing the affirmative defense label on 'at least some elements' of traditional crimes." *Id.* at 475 (quoting *Patterson*, 432 U.S. at 210). The Court reaffirmed, however, that it has not "budge[d] from the position that . . . constitutional limits exist to states' authority to define away facts necessary to constitute a criminal offense." 530 U.S. at 486.

Although the Court has never said what would fall beyond the limits identified in *Patterson* and confirmed in *Apprendi*, there have been strong suggestions by members of the Court that call Arizona's child molestation statutes into constitutional question. Foremost, in *Apprendi*, Justice O'Connor criticized the rule announced by the majority, saying that New Jersey could easily evade that rule simply by restructuring the form of the statute. 530 U.S. at 541-42 (O'Connor, J., dissenting). Rejecting the dissent's charge that the opinion's rule could be easily evaded, the Court answered:

> [I]f New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not . . .), we would be

> required to question whether the revision was constitutional under this Court's prior decisions.

Apprendi, 530 U.S. at 490 n.16 (citing *Patterson*, 432 U.S. at 210, and *Mullaney v. Wilbur*, 421 U.S. 684, 698-702 (1975)). Arizona effected exactly the reversal the Court hypothesized in *Apprendi*: now Arizona's child molestation statutes "assum[e] a crime was performed with a [sexual interest] and then requir[e] a defendant to prove that it was not." *See id.*

In posing this hypothetical, the *Apprendi* majority echoed Justice Powell's dissent in *Patterson* that the majority had established an "indefensibly formalistic" rule that "allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime." *Patterson*, 432 U.S. at 223-24 (Powell, J., dissenting). In fact, Justice Powell presciently described another hypothetical, this one a murder statute, which he believed would be clearly unconstitutional, but would nevertheless comply with the formal requirements described by *Patterson*'s majority:

> [A] state statute could pass muster . . . if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable mens rea. The State, in other words, could be

> relieved altogether of responsibility for proving anything regarding the defendant's state of mind . . . .

432 U.S. at 224 n.8; *see also id.* at 225 n.9. Arizona has done exactly what Justice Powell feared.

Perhaps inevitably, because *Patterson* left "no principled basis for concluding that such a statute falls outside the 'obvious' constitutional limits the Court invoke[d]," *id.* at 225 n.9, the Arizona legislature has drafted a statute that unilaterally declares those limits non-existent. The current version of the charging statute, Ariz. Rev. Stat. § 13-1410(A), reflects a wholesale revision that, with the deletion of the word "molests," removed from the statute the "essential element . . . that the acts involved be 'motivated by an unnatural or abnormal sexual interest or intent with respect to children.'" *Brooks*, 586 P.2d at 1272 (quoting *Berry*, 419 P.2d at 340); *see* 1993 Ariz. Sess. Laws Ch. 255, § 28. And, although sexual motivation is no longer labeled an element, the availability of the affirmative defense makes clear that criminal culpability continues to hinge on the presence or absence of that fact. Indeed, it is this element of *mens rea* that distinguishes innocent touching of children from touching that the State is trying to punish. *Cf. Patterson*, 432 U.S. at 211 n.13 ("It would be an abuse of affirmative defenses . . . if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime.")

(quoting *People v. Patterson,* 39 N.Y.2d 288, 305-07 (N.Y. 1976) (Breitel, C.J., concurring)).

The affirmative defense of lack of motivation by sexual interest is the tail that wags the dog of the offense of child molestation: *any* criminal punishment depends on the existence of that fact. *See McMillan*, 477 U.S. at 88 (upholding mandatory minimum statute because it gave "no impression of having [the operative sentencing factor] . . . be a tail which wags the dog of the substantive offense"). Over and again, this Court has suggested that such a statute would be unconstitutional. This case demonstrates the need to replace suggestion with certainty.

B. This Court Should Resolve the Tension Between *Apprendi* and *Patterson* So That States Can Discern When a Defendant May Bear the Burden of Proof Regarding Facts Necessary to Authorize Punishment.

The principal dissent in *Apprendi* pointed to a number of apparent inconsistencies created by the majority's holding, among them the tension between the legislative deference approved in *Patterson* and the more searching examination of a statute's function mandated by *Apprendi*. 530 U.S. at 545 (O'Connor, J., dissenting). Justice O'Connor, joined by Chief Justice Rehnquist and Justice Breyer, observed that "[t]he rule set forth in *Patterson* [is] 'that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of

the elements of the offense is usually dispositive.'" *Apprendi*, 530 U.S. at 534 (O'Connor, J., dissenting) (quoting *McMillan*, 477 U.S. at 85). In contrast, the "actual principle" of *Apprendi* is that "any fact . . . that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 543. Thus, Justice O'Connor found it "difficult to understand why the rule adopted by the Court in [*Apprendi*] . . . would not require the overruling of *Patterson*." *Id.* at 531.

Though Justice O'Connor was of the view that *Apprendi* and *Patterson* are wholly irreconcilable, both cases can be placed in the long line of cases in which the Court has either outlined or given content to the due process command that "the jury find beyond a reasonable doubt every fact necessary to constitute the crime." *Apprendi*, 530 U.S. at 499-500 (Scalia, J., concurring) (citing *In re Winship*, 397 U.S. at 364). In *Mullaney*, the Court held that a Maine statute impermissibly "shifted the burden of proof to the defendant" to negate the murder element of "malice aforethought" by requiring the defendant to prove he acted with "heat of passion on sudden provocation" to reduce the crime to manslaughter. 421 U.S. at 701, 705. The Court spoke in broad terms, rejecting the notion that *Winship* should be "limited to those facts that constitute a crime as defined by state law" because a "State could undermine many of the interests that decision sought to protect" merely by

"redefin[ing] the elements that constitute different crimes." *Id.* at 698.

Patterson upheld New York's murder statute against a challenge based on *Mullaney*, because, although the defendant had the burden to prove "extreme emotional disturbance" to reduce the crime from murder to manslaughter, "New York, unlike Maine, had not made malice aforethought, or any described *mens rea*, part of its statutory definition of second-degree murder." *Apprendi*, 530 U.S. at 485 n.12 (discussing *Mullaney* and *Patterson*). Deference to New York's definition of murder was warranted, the Court reasoned, because the prosecution must prove beyond a reasonable doubt only "the elements included in the definition of the offense" charged; New York remained free to create affirmative defenses and require the defendant to carry the burden on those defenses. *Patterson*, 432 U.S. at 210-11. Yet, the Court recognized that its deference to legislatures left open the door to states' amending criminal statutes to shift the burden of proof on some elements of existing crimes and assured that "there are obviously constitutional limits beyond which the States may not go in this regard." *Id.* at 210.

More than two decades later, *Apprendi* conclusively confirmed in one important regard the constitutional limits on the states' ability to manipulate burdens of proof: any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Apprendi, 530 U.S. at 490. Put differently, "all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). That limit on legislative power has been aggressively enforced by this Court since *Apprendi*. *See Ring*, 536 U.S. at 609 (holding that aggravating factors "necessary for imposition of the death penalty" must be found by jury, not judge); *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004) (invalidating Washington's sentencing scheme, which allowed judge-found facts to increase punishment); *United States v. Booker*, 543 U.S. 220, 243-44 (2005) (applying *Apprendi* and *Blakely* to the mandatory federal Sentencing Guidelines); *Cunningham v. California*, 549 U.S. 270, 293 (2007) (invalidating California's determinate sentencing scheme); *cf. Oregon v. Ice*, 555 U.S. ___, ___, 129 S. Ct. 711, 722 (2009) (Scalia, J., dissenting) ("The right to . . . proof beyond a reasonable doubt is a given, and all legislative policymaking – good and bad, heartless and compassionate – must work within the confines of that reality.").

Critically, however, *Apprendi*, *Ring*, *Blakely*, *Booker*, and *Cunningham* considered facts necessary to *increase the degree* of punishment. Those cases and all others have left the core question from *Mullaney* and *Patterson* unanswered: To what extent may states redefine crimes and reallocate burdens of proof

with regard to facts that authorize criminal punishment in the first place?

The Court must clarify this question because, as noted by Justice O'Connor in her *Apprendi* dissent, *Patterson* and *Apprendi* lead lower courts in different directions. Some courts have construed *Patterson* to mean *only* that a criminal statute may not require the defendant to negate an express element of the offense. *See, e.g.*, *United States v. Leal-Cruz*, 431 F.3d 667, 671 (9th Cir. 2005) (holding that due process "forbids shifting the burden . . . only where establishing the defense would necessarily negate an element"); *United States v. Kloess*, 251 F.3d 941, 947-48 (11th Cir. 2001) ("There is agreement, however, [that a]ny defense which tends to negate an *element* of the crime charged . . . must be *disproved* by the government."); *Davis v. Barber*, 853 F.2d 1418, 1421 (7th Cir. 1988) ("*Patterson* makes clear that a state may require a defendant to prove an affirmative defense provided it 'does not serve to negative any facts of the crime which the State is to prove in order to convict.'") (quoting *Patterson*, 530 U.S. at 207); *Wood v. Marshall*, 790 F.2d 548, 550 (6th Cir. 1986) ("If the defense does not bear upon an element of the crime, placing the burden of proof of the defense on the defendant does not violate his due process rights under *In Re Winship*, *Mullaney*, or *Patterson*.").

At the same time, *Apprendi* seems to reject *Patterson*'s extreme deference to legislatures, noting that "the relevant inquiry is one not of form, but of effect." 530 U.S. at 494; *see also Harris*, 536 U.S. at

557 (plurality opinion) ("Though defining criminal conduct is a task generally left to the legislative branch, . . . Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt.") (internal quotation marks and citations omitted); *cf. Patterson*, 432 U.S. at 225 (Powell, J. dissenting) ("This decision simply leaves us without a conceptual framework for distinguishing abuses from legitimate legislative adjustments of the burden of persuasion in criminal cases."). Arizona's legislative legerdemain allows this Court to now determine where *Patterson* deference ends and the borders of *Apprendi*-land begin. *Cf. Ring*, 536 U.S. at 613 (Scalia, J., concurring).

C. State Courts Have Reached Conflicting Decisions Regarding the States' Authority to Tamper with the Prosecution's Burden of Proof in Child Molestation Cases.

Arizona's is not the only legislature to enact statutes that manipulate the prosecution's burden to prove sexual intent, beyond a reasonable doubt, in sexual molestation cases. Courts in these states, however, are split on the constitutionality of such statutes. *Cf. Jones*, 526 U.S. at 241-42 (noting that *Patterson*'s "stated recognition of some limit upon state authority to reallocate the traditional burden of

proof" remains open to "a narrow reading . . . [and] a broader reading").

For instance, explaining that its legislature had gone too far, the Minnesota Supreme Court relied on *Winship* and *Mullaney* to hold unconstitutional a jury instruction which, for conviction, required merely that the jury be "satisfied . . . that the touching could reasonably be construed as being for the purpose of satisfying the defendant's sexual impulses." *Tibbetts*, 281 N.W.2d at 500. The court concluded that the language of the instruction unconstitutionally shifted "the degree of proof . . . from acts which *must* be proved beyond a reasonable doubt to acts which *could* reasonably be construed or interpreted to be for an improper purpose." *Id.*; *accord State v. Nye*, 302 N.W.2d 83, 85-86 (Wis. Ct. App. 1981) (relying on *Tibbetts* and explaining that when the "legislature has chosen to make this a crime involving proof of specific intent . . . the legislature cannot then mandate that the specific intent can be proven by evidence which does not satisfy the reasonable doubt standard"), *aff'd* 312 N.W.2d 826 (Wis. 1981), *and abrogated on other grounds as recognized in State v. Shah*, 397 N.W.2d 492, 495 n.4 (Wis. Ct. App. 1986); *see also People v. West*, 724 P.2d 623, 628 (Colo. 1986) ("harmoniz[ing] the 'can reasonably be construed' language with those basic interests underlying the void-for-vagueness doctrine" by construing "sexual contact . . . to mean the intentional touching . . . for the purpose of sexual arousal, gratification, or abuse"). In reaching their decisions, these courts went beyond

the statutes' language and engaged in "an analysis that looks to the operation and effect of the law." *Mullaney*, 421 U.S. at 699 (citation omitted); *see also Apprendi*, 530 U.S. at 494.

Addressing a *Mullaney*-based challenge to a statute almost identical to the one at issue in *Tibbetts,* the Michigan Court of Appeals reached the opposite result. *In re Wentworth*, 651 N.W.2d at 776. The court reasoned that "the statute merely requires the prosecution to establish an intentional contact that could reasonably be construed as being for a sexual purpose." *Id.* (citing *People v. Piper*, 567 N.W.2d 483 (Mich. Ct. App. 1997)). In rejecting the defendant's argument that the statute impermissibly shifted the burden of proof, the court treated "the state legislature's definition of the elements of the offense . . . [as] dispositive," *McMillan*, 477 U.S. at 85 (stating *Patterson*'s rule). *See also Bryan v. State*, 745 P.2d 905, 909 (Wyo. 1987) (concluding that sexual or illicit intent was not an element of a sex offense because the statute required proof only "that a transgressor's acts be reasonably construed as for the purpose of abuse or gratification"); *cf. People v. Vigil*, 127 P.3d 916, 933-34 (Colo. 2006) (calling relevant part of *West* dicta and holding that sexual assault is a "general-intent crime," making voluntary intoxication unavailable as a defense); *State v. Osborn*, 490 N.W.2d 160, 167 (Neb. 1992) (noting that to prove "sexual contact" "the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose").

Like Michigan, Nebraska, Wyoming, and most recently Colorado, the Arizona Court of Appeals charted a highly deferential path in determining that Arizona Revised Statutes sections 13-1407(E) and 13-1410 properly required May to disprove that his actions were motivated by a sexual interest. (Pet. App. 4); *see Simpson*, 173 P.3d at 1029-30; (Pet. App. 18) (applying "clear and unambiguous" statutory language to hold that Section 13-1410 "does not require the State to prove . . . motivat[ion] by sexual interest"). Especially in light of *Apprendi*'s admonition that "the relevant inquiry is one not of form, but of effect," 530 U.S. at 494, resolving the constitutionality of Arizona's reallocation of the burden of proof on the critical fact of sexual motivation will give Arizona and its sister states much needed clarity on the appropriate level of deference to legislative definitions of crimes.

D. The Constitutional Question Raised Is of Surpassing Importance Because Arizona's Statutes Relieve the State of Its Burden to Prove the Very Fact That Justifies Punishment.

The question at issue here implicates constitutional protections that this Court has characterized as "of surpassing importance." *Apprendi*, 530 U.S. at 476. Indeed, "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of criminal law. It is

critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *In re Winship*, 397 U.S. at 364. This concern is at its height "in a case . . . where the defendant is required to prove the critical fact in dispute" because the "result . . . is to increase further the likelihood of an erroneous . . . conviction." *Mullaney*, 421 U.S. at 701; *cf.* 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872) ("[A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.").

Moreover, the interests at the heart of the Constitution's demand for a higher standard of proof in criminal cases are magnified here because of the severe loss of liberty and powerful stigma attached to a child molestation conviction. *See In re Winship*, 397 U.S. at 363. Due process cannot allow the State to visit upon one of its citizens such dire consequences in the absence of proof beyond a reasonable doubt of the very fact – motivation by sexual interest – that makes child molestation so repugnant. *Cf. Apprendi*, 530 U.S. at 495 ("The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."). By re-labeling the element of sexual interest as an

affirmative defense, Arizona allows an accused to be punished as a *sex* offender with no requirement that the State prove anything *sexual* about the accused's conduct.

CONCLUSION

Arizona has done with its definition of child molestation exactly what Justice Powell feared when he dissented in *Patterson*. 432 U.S. at 223-24 (Powell, J., dissenting). The Court in *Patterson* assured the States and defendants alike that there existed some undefined constitutional limits that would prevent legislative chicanery from circumventing due process. *Id.* at 210 (majority opinion). The Court's intervention is now needed to fulfill *Patterson*'s promise that these constitutional limits do in fact exist.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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2008 WL 2917111

Court of Appeals of Arizona,
Division 1, Department D.
STATE of Arizona, Appellee,
v.
Stephen Edward MAY, Appellant.
No. 1 CA-CR 07-0144.

July 24, 2008.

Review Denied Feb. 10, 2009.

Appeal from the Superior Court in Maricopa County; Cause No. CR2006-030290-001 SE; The Honorable Sherry K. Stephens, Judge. AFFIRMED.

Terry Goddard, Attorney General By Randall M. Howe, Chief Counsel, Criminal Appeals Section, Robert A. Walsh, Assistant Attorney General, Phoenix, Attorneys for Appellee.

Debus, Kazan & Westerhausen, Ltd., By Tracey Westerhausen, Phoenix, Attorneys for Appellant.

MEMORANDUM DECISION

JOHNSEN, Judge.

¶ 1 Stephen Edward May appeals his convictions and sentences imposed after a jury found him guilty of five counts of child molestation, all Class 2 felonies and dangerous crimes against children. May argues the superior court erred in instructing the jury that he had the burden of proving lack of sexual motivation as a defense to the alleged offenses. He also

contends the superior court erred when it allowed the jury to reconvene after first ordering a mistrial. May also asserts his sentences are excessive. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶ 2 May was tried on seven counts of child molestation. During deliberations, the jury twice notified the court that it was deadlocked. Upon the second notification, the court declared a mistrial. The court then thanked the jurors for their service and told them that the lawyers had indicated they might want to speak with them. "You are certainly under no obligation to do so," the court told the jury. "If you are willing to speak with the lawyers, I would ask that you wait back in the jury room and they will be in shortly." The court announced that the jury was excused and then observed, "The record will show the jury has left the courtroom." According to the record, approximately four minutes later, the court noted that some of the jurors had informed the bailiff that they did not want a "hung jury," and they asked to continue deliberations. The court asked counsel if there was an objection to granting the jury's request. The prosecutor and defense counsel both responded that they did not object.

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[1] We review the facts in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against May. *State v. Long*, 207 Ariz. 140, 142, ¶ 2, 83 P.3d 618, 620 (App.2004).

¶ 3 After several additional hours of deliberation, the jury returned guilty verdicts on five of the seven charges. May moved for a new trial, which the superior court denied. The court sentenced May to consecutive slightly mitigated 15-year terms for each conviction. After May's timely appeal, we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (2001).

DISCUSSION

A. Defense of Lack of Sexual Motivation.

¶ 4 May first contends the superior court erred in instructing the jury that lack of sexual motivation is an affirmative defense that he was required to prove by a preponderance of evidence.[2] May argues the State should have the burden to prove beyond a reasonable doubt that he acted with the requisite sexual motivation.

¶ 5 Under A.R.S. § 13-1410(A) (2001), "[a] person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact . . . with a

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[2] For purposes of this decision, we assume, without deciding, that May was entitled to an affirmative defense instruction. *See State v. Gilfillan*, 196 Ariz. 396, 407, ¶ 40, 998 P.2d 1069, 1080 (App.2000) (defendant not entitled to self-defense instruction because he denied committing the act underlying his aggravated assault charge).

child under fifteen years of age." "'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body . . . " A.R.S. § 13-1401(2) (2001). Pursuant to A.R.S. § 13-1407(E) (Supp.2007), "[i]t is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by a sexual interest."[3]

¶ 6 We rejected May's argument in a recent opinion, *State v. Simpson,* 217 Ariz. 326, 173 P.3d 1027 (App.2007), in which we held that "[t]he 'sexual interest' provision of § 13-1407(E) is not an element of the offense of child molestation, but rather creates an affirmative defense regarding motive." *Id.* at 329, ¶ 19, 173 P.3d at 1030 (internal quotation and citation omitted). We see no reason why *Simpson* does not dispose of this issue.[4] The cases May cites do not persuade us otherwise. *State v. Brooks,* 120 Ariz. 458, 586 P.2d 1270 (1978), and *State v. Turrentine,* 152 Ariz. 61, 730 P.2d 238 (App.1986), both addressed a prior version of § 13-1410 that made it a crime to "knowingly molest[ ]" a child. *See* 1977 Ariz. Sess.

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[3] We cite a statute's current version when no changes material to this decision have occurred since the relevant date.

[4] The fact that we reviewed the purported trial error in *Simpson* under a fundamental error analysis does not mean the holding in *Simpson* does not apply here. We concluded in *Simpson* that the superior court's failure to *sua sponte* instruct the jury that the State had the burden to prove defendant's sexual motivation was not "error, fundamental or otherwise." *Simpson,* 217 Ariz. at 330, ¶ 23, 173 P.3d at 1031.

Laws, ch. 142, § 66 (1st Reg.Sess.) (amending and renumbering A.R.S. § 13-653 to § 13-1410); 1993 Ariz. Sess. Laws, ch. 255, § 29 (1st Reg.Sess.) (amending § 13-1410 to reflect its current version). Accordingly, the superior court did not abuse its discretion in instructing the jury that May had the burden to prove he was not motivated by sexual interest when he touched the victims' genitals through their clothes. *See State v. Johnson,* 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741 (2006) (denial of a requested jury instruction is reviewed for an abuse of discretion).

B. Continuing Jury Deliberations After Discharge.

¶ 7 May argues the superior court erred by allowing the jury to reconvene to continue deliberating after the court had declared a mistrial. We review only for fundamental error because May failed to object when the superior court reassembled the jury and permitted it to resume deliberating. *See State v. Velazquez,* 216 Ariz. 300, 309, ¶ 37, 166 P.3d 91, 100 (2007); *see also State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under fundamental error review, May must show that error occurred, the error was fundamental and that he was prejudiced thereby. *See id.* at 567, ¶ 20, 115 P.3d at 607.

¶ 8 The only Arizona case cited to us (or which we have found) in which a jury reconvened after having been discharged is *State v. Crumley,* 128 Ariz. 302,

305-06, 625 P.2d 891, 894-95 (1981). In that case, it was discovered "almost immediately" after the jury was discharged that trial on the issue of prior convictions had been overlooked. *Id.* at 305, 625 P.2d at 894. The bailiff in short order located six of the eight jurors. The other two were reached at their homes, and all eight returned the next day to take up the prior conviction issue. Under those circumstances, our supreme court said:

> Once discharged, we think this jury could not be properly recalled to further decide an issue of this case. It is simply too dangerous a practice to discharge the individual jurors from the duties and obligations of their oath, send them back into the community without admonitions or instructions, and then recall those same jurors to make a fair and impartial determination of any remaining issue connected with the case.

Id. at 306, 625 P.2d 891,625 P.2d at 895.

¶ 9 The facts in this case are different – the jury reconvened only a few minutes after having been discharged. Although nothing in the record tells us the jurors did not interact with the public in the meantime, the court had invited the jurors to gather again in the jury room. In any event, we know that they did not have the extended opportunity for contact with the public that occurred in *Crumley.*

¶ 10 Although the court in *Crumley* might have announced a rule that any verdict rendered after a jury once has been discharged is null and void, it did

not; instead, it reasoned that under the facts of that case, a verdict issued after the jury had been "sen[t] . . . back into the community without admonitions or instructions" could not stand.[5] We take from *Crumley,* therefore, that under Arizona law, structural error requiring reversal does not occur whenever a jury that has been discharged reconvenes and issues a guilty verdict. *See State v. Ring,* 204 Ariz. 534, 552, ¶ 45, 65 P.3d 915, 933 (2003) (when structural error occurs, conviction is automatically reversed); *Summers v. United States,* 11 F.2d 583, 586 (4th Cir.1926) ("the mere announcement of their discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling" the jury); *Masters v. Florida,* 344 So.2d 616, 620 (Fla.App.1977) (burden on defendant to prove outside influence on jury during period of discharge). *But see Blevins v. Indiana,* 591 N.E.2d 562, 563 (Ind.App.1992) ("Any action of the jury after its discharge is null and void.");

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[5] The common-sense approach articulated in *Crumley* is like that taken by the court in *Washington v. Edwards,* 15 Wash.App. 848, 552 P.2d 1095 (Wash.App.1976). As here, the jury in that case was reconvened minutes after discharge. The court said, "A discharge will occur in fact when a jury is permitted to pass from the sterility of the court's control and allowed to separate or disperse and mingle with outsiders." Although the court noted that "contamination is presumed" when the discharged jury mingles with the public, it did not reverse the verdict because "the jury did not pass from the control of the court but merely exited the courtroom to the adjacent jury room," to which no member of the public had access. *Id.* at 850-51, 552 P.2d 1095.

Michigan v. Rushin, 37 Mich.App. 391, 194 N.W.2d 718, 721-22 (Mich.App.1971) (error to reconvene jury after it had left the courtroom, "be it for two minutes or two days"); *Tennessee v. Green,* 995 S.W.2d 591, 614 (Tenn.1998) (convictions vacated; jury may not be reconvened if it has been discharged and "outside contacts may have occurred") (internal quotation and citation omitted); *Melton v. Virginia,* 132 Va. 703, 111 S.E. 291, 294 (Va.1922) (reversing conviction: "[i]t is sufficient that the jury had left the presence of the court"); *cf. Arnold v. Alabama,* 639 So.2d 553, 554-55 (Ala.1993) (new trial granted when jury reconvened over defendant's objection; record did not disclose amount of time that elapsed between discharge and reconvening of jury or where jury was in the meantime).

¶ 11 May argues that we may presume that he was prejudiced when the jury was allowed to reconvene; at oral argument, for example, his counsel urged that we may take as common knowledge that jurors would reach for their cell phones to call friends or family immediately upon discharge. May points to nothing in the record that would demonstrate such prejudice, however, and, pursuant to *Henderson,* we will not presume prejudice when, by contrast to the facts in *Crumley,* the record does not disclose that the jury was "sen[t] back into the community" before reconvening. Accordingly, we may not reverse his conviction on this ground.

C. Sentencing Issues.

¶ 12 Finally, May argues the superior court abused its discretion in sentencing him to only "slightly mitigated" sentences because his "conduct was far milder than the usual child molest case." We find no abuse of discretion.

¶ 13 A superior court has broad discretion to determine the sentence to impose, and we will not disturb a sentence that is within statutory limits, as is May's, unless the court clearly abused its discretion. *State v. Cazares,* 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App.2003). We will find an abuse of sentencing discretion only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing. *Id.* Provided the superior court fully considers the factors relevant to imposing sentence, we generally will find no abuse of discretion, and the weight to be given any factor asserted in mitigation rests within the superior court's sound discretion. *See id.*

¶ 14 Prior to sentencing, the court announced it had considered the nature and circumstances of the offenses and May's contact with the victims, the position of trust May enjoyed with the victims' families, the ongoing relationship he had with them, the impact the offenses had on the victims and their families and the need to protect the community. In

mitigation,[6] the court considered May's social background, his physical impairment,[7] lack of criminal history, his extensive family and community support and the letters submitted on May's behalf. We discern no abuse of discretion in the court's imposition of consecutive 15-year prison sentences, two years less than the presumptive 17-year term for a single offense. *See* A.R.S. § 13-604.01(D) (Supp.2007).

¶ 15 May alternatively requests we exercise our authority under A.R.S. § 13-4037(B) (2001) to order that certain of his sentences run concurrent with each other, so as to effectively reduce his aggregate sentence by 30 years. A sentence that is within the statutory limits will not be reduced absent a showing that it was the result of "arbitrariness, capriciousness, or failure to conduct adequate investigation into facts relevant to sentencing." *State v. Ramos,* 133 Ariz. 4, 7, 648 P.2d 119, 122 (1982). Having determined the superior court properly considered the facts relevant to sentencing, we decline to order May's sentences to run concurrently in the manner he requests. *See State v. Fillmore,* 187 Ariz. 174, 185, 927 P.2d 1303, 1314 (App.1996) (court of appeals' statutory discretion to reduce excessive sentences must be exercised with great caution).

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[6] The State dismissed its allegation of aggravating circumstances prior to the sentencing hearing.

[7] May has a neurological condition that causes his head to uncontrollably "tick" and other physical manifestations.

¶ 16 Finally, May contends that the individual sentences for each count and his lengthy aggregate sentence constitute cruel and unusual punishment. As May concedes, he did not raise this argument below. Therefore, he has waived this issue and we need not address it. *See State v. Navarro,* 201 Ariz. 292, 298 n. 6, ¶ 22, 34 P.3d 971, 977 n. 6 (App.2001) (Eighth Amendment argument that was not raised before the trial court is waived on appeal). Even if we were to consider this argument, however, pursuant to *State v. Berger,* 212 Ariz. 473, 476, ¶¶ 15-16, 134 P.3d 378, 381 (2006), we would be compelled to conclude that his sentence is not grossly disproportionate to his crimes.

CONCLUSION

¶ 17 May's convictions and sentences are affirmed.

CONCURRING: JON W. THOMPSON and ANN A. SCOTT TIMMER, Judges.

173 P.3d 1027

Court of Appeals of Arizona,
Division 1, Department B.
STATE of Arizona, Appellee,
v.
Kelvin Thomas SIMPSON, Appellant.
No. 1 CA-CR 06-0748.

Dec. 18, 2007.

Terry Goddard, Attorney General By Randall M. Howe, Chief Counsel, Criminal Appeals Section and Michael O'Toole, Assistant Attorney General, Phoenix, Attorneys for Appellee.

Law Office of Treasure VanDreumel PLC By Treasure L. VanDreumel, Phoenix, Attorneys for Appellant.

OPINION

OROZCO, Judge.

¶ 1 Kelvin Thomas Simpson (Defendant) appeals from two counts of child molestation and two counts of attempted child molestation following a jury trial and from the sentences imposed. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles,* 213 Ariz. 268, 270, ¶ 2, 141 P.3d 748, 750 (App.2006). On June

2, 2005, A.A., her twin sister, N.A., and their niece, F.A., were swimming in a pool at an apartment complex where the sisters lived. A young boy was also in the pool and the boy's mother was watching the children swim.

¶ 3 At the time of trial, all three girls were nine years old. A.A. testified that while swimming, a man, later identified as Defendant, grabbed her with his left hand while his right hand touched her twice on her vagina over her clothes. A.A. stated she was uncomfortable and tried to get away from him. She asked the boy to tell his mother about the incident. However, the boy was too young to understand what she was relating and the boy's mother did not speak English. Later, A.A. told her own mother what occurred.

¶ 4 F.A. testified at trial that while swimming in the pool, Defendant touched her on her thigh near her vagina. She also tried to tell the boy and his mother about it, but neither could understand her. However, when some friends came over to the pool, F.A. told them to tell her grandmother about the incident.

¶ 5 N.A. testified that when she was swimming with her sister and her niece, Defendant touched her "upper leg." She said that because she was bothered by the touch, she told her sister and her niece.

¶ 6 The twins' mother, F.F., and F.A.'s grandmother, testified at trial. She stated that when she returned home from the grocery store and walked by the pool, she saw Defendant in the pool with the girls. She

indicated she was concerned about the situation because she had seen Defendant staring at "little girls" and "wom[e]n" for "long periods of time."

¶ 7 F.F. testified that as she was putting her groceries away, a neighbor girl came by her apartment and said the boy's mother wanted to talk to her. After they spoke, F.F. took the children out of the pool and called the police. F.F. testified that she had previously instructed the girls that if anyone touched their private areas, they should tell someone.

¶ 8 A Phoenix Police Officer responded to the call at the victims' apartment complex. He testified the victims appeared upset. He indicated he spoke to the boy's mother who reported that Defendant "had looked at the children in a bad way." Defendant was arrested that day.

¶ 9 A few days after the incident, a Phoenix Police Detective interviewed the three children individually. The detective used a stuffed bear to assist the girls in identifying the body parts where Defendant had touched them. A.A. indicated Defendant had touched her on the vagina over her clothes. N.A. and F.A. indicated that Defendant had touched each of them on the crevice of the upper thigh near the vagina. The detective also interviewed the boy's mother who

reported she did not see Defendant touch the children.[1]

¶ 10 Defendant was indicted on two counts of child molestation (A.A.) and two counts of attempted child molestation (F.A. and N.A.), all class 3 dangerous crimes against children. The jury found him guilty on all counts. The court sentenced Defendant to the presumptive term of imprisonment of seventeen years on Count One and a mitigated term of imprisonment of ten years on Count Two,[2] the sentences to run consecutively. The court imposed lifetime probation on Counts Three and Four to begin after Defendant served the sentences on Counts One and Two. Defendant timely appealed. We have jurisdiction pursuant to

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[1] Defendant did not testify at trial. However, his defense was that the children were either mistaken about what occurred, they had reported it incorrectly or any contact by him was "inadvertent."

[2] The minute entry of September 1, 2006, erroneously states the term of imprisonment for Count Two was the presumptive term. However, based on the oral pronouncement by the trial court at the sentencing hearing, it is clear the court imposed a mitigated sentence as to Count Two. *See State v. Hanson,* 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App.1983) ("Where there is a discrepancy between the oral sentence and the written judgment, the oral pronouncement of sentence controls."). Pursuant, therefore, to A.R.S. § 13-604.01 (Supp.2006), we correct the minute entry to reflect the trial court's imposition of a *mitigated* sentence as to Count Two. *See State v. Vandever,* 211 Ariz. 206, 210, 119 P.3d 473, 477 (App.2005) (holding that this court must correct an inadvertent error in a sentencing minute entry); *see also State v. Stevens,* 173 Ariz. 494, 496, 844 P.2d 661, 663 (App.1992).

Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2001).

DISCUSSION

¶ 11 On appeal, Defendant argues the trial court committed fundamental error in failing to fully instruct the jury on the requisite culpable mental states for child molestation and attempted child molestation. In particular, he claims the court was required to inform the jury that to convict him, the jury had to find that Defendant's actions were motivated by sexual interest pursuant to A.R.S. § 13-1407(E) (Supp.2006).

¶ 12 As Defendant did not object to the instructions given "and did not request any additional instruction, we review only for fundamental error." *State v. Garnica,* 209 Ariz. 96, 99, ¶ 15, 98 P.3d 207, 210 (App.2004). "To obtain relief under the fundamental error standard of review, [a defendant] must first prove error." *State v. Henderson,* 210 Ariz. 561, 568, ¶ 23, 115 P.3d 601, 608 (2005). The defendant must then show that the "error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at ¶ 24, 115 P.3d 601. Finally, the defendant must "demonstrate that the error caused him prejudice." *Id.* at ¶ 26, 115 P.3d 601.

¶ 13 The jury was instructed according to the applicable statutes. Under A.R.S. § 13-1410(A) (2001), "[a]

person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact . . . with a child under fifteen years of age." Under A.R.S. § 13-1401(2) (2001), "'[s]exual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body. . . ." Under A.R.S. § 13-1001(A)(2) (2001), "[a] person commits attempt, if acting with the kind of culpability otherwise required for commission of an offense, such person . . . [i]ntentionally does . . . anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense. . . ."

¶ 14 Pursuant to A.R.S. § 13-105(9)(a) (Supp.2006), "'[i]ntentionally' . . . means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct." Under A.R.S. § 13-105(9)(b), "'[k]nowingly' means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that his or her conduct is of that nature or that the circumstance exists."

¶ 15 Under A.R.S. § 13-1407(E), "[i]t is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by a sexual interest." Defendant claims the trial court should have *sua sponte* instructed the jurors that the State was

required to prove that Defendant's actions were motivated by sexual interest under A.R.S. § 13-1407(E). We disagree.

¶ 16 In construing a statute, "[w]e look primarily to the language of the statute itself and give effect to the statutory terms in accordance with their commonly accepted meanings." *State v. Reynolds,* 170 Ariz. 233, 234, 823 P.2d 681, 682 (1992). "If a statute's language is clear and unambiguous, the court will give it effect without resorting to other rules of statutory construction." *Id.*

¶ 17 The elements of the crime of child molestation are set forth in A.R.S. § 13-1410. *See In re Jerry C.,* 214 Ariz. 270, 273, ¶ 9, 151 P.3d 553, 556 (App.2007). The affirmative defenses applicable to specific sexual offenses in Chapter 14 are set forth in A.R.S. § 13-1407. *See State v. Getz,* 189 Ariz. 561, 564-65, 944 P.2d 503, 506-07 (1997).

¶ 18 The statutory elements under § 13-1410 are clear and unambiguous. The statute defining the crime of child molestation does not require the State to prove that Defendant's conduct was motivated by sexual interest under A.R.S. § 13-1407(E). Our supreme court has held that because defining crimes is a legislative function, "[c]ourts may not add elements to crimes defined by statute. . . ." *State v. Miranda,* 200 Ariz. 67, 69, ¶ 5, 22 P.3d 506, 508 (2001) (disorderly conduct statute does not require that one actually disturb the peace as an element of offense, but only requires commission of certain acts with intent

to disturb peace); *see also Getz,* 189 Ariz. at 563-66, 944 P.2d at 505-08 (where statute defining offense of sexual abuse under A.R.S. § 13-1404 is "plain on its face," it must be applied "as written" and any affirmative defense under § 13-1407 should not be "inject[ed]" into elements of the crime); *State v. Sandoval,* 175 Ariz. 343, 345-47, 857 P.2d 395, 397-99 (App.1993) (trial court erred in dismissing charges against defendant for indecent exposure on ground that defendant's actions had to be motivated by sexual interest where language of statute defining crime was unambiguous and did not include this as an element).

¶ 19 The "sexual interest" provision of § 13-1407(E) is not an element of the offense of child molestation, but rather "create[s] an affirmative defense regarding motive." *State v. Sanderson,* 182 Ariz. 534, 542, 898 P.2d 483, 491 (App.1995). Thus, "proving the existence of [sexual] motivation [is] not necessary to establish guilt of child molestation under the statute at issue." *Id.* Further, under A.R.S. § 13-205(A) (Supp.2006), "[e]xcept as otherwise provided by a law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence." *See State v. Farley,* 199 Ariz. 542, 544, ¶ 11, 19 P.3d 1258, 1260 (App.2001) (an affirmative defense is not an element of an offense but "is a matter of avoidance of culpability even if the State proves the offense beyond a reasonable doubt.").

¶ 20 Relying on *State v. Lujan,* 192 Ariz. 448, 451, ¶ 7, 967 P.2d 123, 126 (1998) and *Maricopa County*

Juv. Action No. JV-121430, 172 Ariz. 604, 606-07, 838 P.2d 1365, 1367-68 (App.1992), Defendant argues that the crime of child molestation not only requires that the defendant touch a child's private parts but also that the defendant be motivated by a sexual interest. In *JV-121430,* this court interpreted a prior version of A.R.S. § 13-1410 which made it a crime to "knowingly molest [ ] a child under the age of fourteen years by directly or indirectly touching the private parts of such child. . . ." 172 Ariz. at 606 n. 2, 838 P.2d at 1367 n. 2. Because the statute did not define "molest," a term which the court noted connoted sexual motivation, it clarified the requisite mental state for the crime of molestation.[3] Construing the term "molest" in light of certain statutory changes, including the enactment of A.R.S. § 13-1407(E), the court concluded "the intent necessary to commit the crime of molestation is . . . that the actor be motivated by a 'sexual interest.'". *Id.* at 606-07, 838 P.2d at 1367-68.

¶ 21 In *State v. Lujan,* the defendant was convicted of child molestation when he touched a child on her private parts while swimming in a pool. 192 Ariz. at 450-51, ¶¶ 2, 7, 967 P.2d at 125-26. Defendant claimed that although he had physical contact with

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[3] Courts interpreting this version of the child molestation statute required a showing of an "unnatural or abnormal sexual interest." *See, e.g., State v. Trenary,* 79 Ariz. 351, 354, 290 P.2d 250, 252 (1955); *Pima County Juv. Appeal No. 74802-2,* 164 Ariz. 25, 33-34, 790 P.2d 723, 731-32 (1990); *State v. Anderson,* 128 Ariz. 91, 92, 623 P.2d 1247, 1248 (App.1980).

the victim, he never touched her private parts. *Id.* at 451, ¶ 8, 967 P.2d at 126. Because the offense occurred in 1993, the defendant was convicted under a similar, but modified, version of A.R.S. § 13-1410, which made it a crime to "knowingly molest [ ] a child under the age of fifteen years by directly or indirectly touching private parts of such child. . . ." *Id.* at 451, ¶ 7, 967 P.2d at 126. Relying on *JV-121430* and A.R.S. § 13-1407(E), the Arizona Supreme Court, in dicta, similarly interpreted the "knowingly molests" language as requiring an additional finding that a defendant be motivated by a "sexual interest." *Lujan,* 192 Ariz. at 451, ¶ 7, 967 P.2d at 126.

¶ 22 Neither *JV-121430* nor *Lujan* construed the current version of A.R.S. § 13-1410, enacted in 1993, which differs from the previous version as the current version does not contain the language "knowingly molests." *See* 1993 Ariz. Sess. Laws, ch. 255, § 29. These cases are, therefore, not persuasive in construing the applicable version of the statute. Also, the current version of A.R.S. § 13-1410 makes molestation of a child a crime if a person "intentionally or knowingly engag[es] in . . . sexual contact . . . with a child under fifteen years of age." Nothing in either *JV-121430* or *Lujan* compels this court to interpret the A.R.S. § 13-1410, as amended, to require proof of "sexual interest" as an element of the offense.[4]

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[4] We should note that in the recent case of *In re James P.,* 214 Ariz. 420, 425, ¶¶ 21-22, 153 P.3d 1049, 1054 (App.2007), this court indicated that sexual motivation was an element of

(Continued on following page)

¶ 23 At trial, Defendant did not assert the affirmative defense that he was not motivated by sexual interest under A.R.S. § 13-1407(E) nor did he present evidence of this defense. Rather, his counsel argued during closing argument that if any touching occurred, it was accidental and defendant did not intentionally or knowingly engage in sexual contact with the children. *Cf. Sanderson,* 182 Ariz. at 542, 898 P.2d at 491 (where defendant was intoxicated when he inappropriately touched the private areas of two children, court found evidence of intoxication sufficient to raise defense that he was not motivated by a sexual interest and jury was so instructed). Because Defendant did not assert this defense, the trial court was not obliged to instruct the jury accordingly.[5] We find no error, fundamental or otherwise.

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child molestation. However, *James P.* addressed whether assault was a lesser-included offense of child molestation, pursuant to A.R.S. § 13-1203(A)(1) (2001), and did not address or attempt to define the elements of child molestation under A.R.S. § 13-1410.

[5] Defendant also contends that the detective who interviewed the children allegedly gave his opinion about what the child molestation statute stated. He alleges this testimony misstated the law and compounded the error. Defendant objected to the testimony and the court overruled the objection. Later, Defendant requested an instruction informing the jury not to consider the officer's interpretation of the law, but the court denied the request. On appeal, Defendant has not raised the issue that the failure to give a curative instruction was error. Furthermore, to the extent Defendant claims the detective's testimony was improper because he opined that mere touching of a child's private parts (regardless of sexual motivation)

(Continued on following page)

CONCLUSION

¶ 24 We have reviewed the issue raised by Defendant. For the foregoing reasons, we affirm his convictions and sentences. Furthermore, we correct the minute entry dated September 1, 2006 to reflect that Defendant was sentenced to a mitigated sentence as to Count Two.

CONCURRING: DANIEL A. BARKER, Presiding Judge and ANN A. SCOTT TIMMER, Judge.

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violates the statute, that argument fails for the reasons set forth above.

No. 2365

MINUTES
Arizona Supreme Court
Tuesday, February 10, 2009

CR-08-0281-PR **STATE OF ARIZONA**
(19) **v STEPHEN EDWARD MAY**

Court of Appeals Division One
1 CA-CR 07-0144

ORDERED: Petition for Review to the Arizona Supreme Court = DENIED

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, v. STEPHEN EDWARD MAY, Appellant.	Arizona Supreme Court No. CR-08-0281-PR Court of Appeals Division One No. 1 CA-CR 07-0144 Maricopa County Superior Court No. CR2006-030290- 001 SE

ORDER

(Filed Mar. 27, 2009)

The Court has received Petitioner's Request for Permission for Reconsideration of an Order Denying Review, Petitioner's accompanying Motion for Reconsideration, Arizona Attorneys for Criminal Justice's Motion for Leave to Appear as Amicus Curiae, and the State's Response to Motion for Reconsideration and Motion to Strike Amicus Curiae Brief. Upon consideration,

IT IS ORDERED denying Petitioner's Request for Permission for Reconsideration of an Order Denying Review, and Arizona Attorneys for Criminal Justice's Motion for Leave to Appear as Amicus Curiae. The State's Motion to Strike is thus moot.

DATED this 27th day of March, 2009.

/s/ Rebecca W. Berch
REBECCA WHITE BERCH
Duty Justice

TO:

Robert A Walsh, Assistant Attorney General, Arizona Attorney General's Office

Tracey Westerhausen, Debus Kazan & Westerhausen LTD

Stephen Edward May, ADOC 214465, Arizona State Prison, Florence Eyman Complex-Meadows Unit

Jean-Jacques Cabou, Osborn Maledon PA

Gerard R O'Meara, Gust Rosenfeld PLC

Kathleen O'Meara, Osborn Maledon PA

Philip Urry, Clerk, Court of Appeals, Division One

mwa

A.R.S. § 13-205. Affirmative defenses; justification; burden of proof

A. Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence. Justification defenses under chapter 4 of this title are not affirmative defenses. Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct. If evidence of justification pursuant to chapter 4 of this title[1] is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification.

B. This section does not affect the presumption contained in § 13-411, subsection C and § 13-503.

A.R.S. § 13-1401. Definitions

In this chapter, unless the context otherwise requires:

1. "Oral sexual contact" means oral contact with the penis, vulva or anus.

2. "Sexual contact" means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.

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[1] Section 13-401 et seq.

3. "Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva.

4. "Spouse" means a person who is legally married and cohabiting.

5. "Without consent" includes any of the following:

(a) The victim is coerced by the immediate use or threatened use of force against a person or property.

(b) The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For purposes of this subdivision, "mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.

(c) The victim is intentionally deceived as to the nature of the act.

(d) The victim is intentionally deceived to erroneously believe that the person is the victim's spouse.

A.R.S. § 13-1407. Defenses

A. It is a defense to a prosecution pursuant to §§ 13-1404 and 13-1405 involving a minor if the act was done in furtherance of lawful medical practice.

B. It is a defense to a prosecution pursuant to §§ 13-1404 and 13-1405 in which the victim's lack of consent is based on incapacity to consent because the victim was fifteen, sixteen or seventeen years of age if at the time the defendant engaged in the conduct constituting the offense the defendant did not know and could not reasonably have known the age of the victim.

C. It is a defense to a prosecution pursuant to § 13-1402, 13-1404, 13-1405 or 13-1406 if the act was done by a duly licensed physician or registered nurse or a person acting under the physician's or nurse's direction, or any other person who renders emergency care at the scene of an emergency occurrence, the act consisted of administering a recognized and lawful form of treatment that was reasonably adapted to promoting the physical or mental health of the patient and the treatment was administered in an emergency when the duly licensed physician or registered nurse or a person acting under the physician's or nurse's direction, or any other person rendering emergency care at the scene of an emergency occurrence, reasonably believed that no one competent to consent could be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

D. It is a defense to a prosecution pursuant to § 13-1404 or 13-1405 that the person was the spouse of the other person at the time of commission of the act. It is not a defense to a prosecution pursuant to § 13-1406 that the defendant was the spouse of the victim at the time of commission of the act.

E. It is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that the defendant was not motivated by a sexual interest. It is a defense to a prosecution pursuant to § 13-1404 involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest.

F. It is a defense to a prosecution pursuant to §§ 13-1405 and 13-3560 if the victim is fifteen, sixteen or seventeen years of age, the defendant is under nineteen years of age or attending high school and is no more than twenty-four months older than the victim and the conduct is consensual.

A.R.S. § 13-1410. Molestation of a child; classification

A. A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age.

B. Molestation of a child is a class 2 felony that is punishable pursuant to § 13-604.01.

PHILLIPS & ASSOCIATES, P.C.
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(602)288-1678

JOEL ERIK THOMPSON, S.B.A. No. 4079
Attorneys for Defendant.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	No. **CR2006-030290 -001 SE**
Plaintiff,	**DEFENDANT'S REQUESTED JURY INSTRUCTIONS** and **FORMS OF VERDICT**
v.	
STEPHEN MAY,	(Filed Jan. 8, 2007)
Defendant.	(Assigned to Hon. Sherry Stephens)

Defendant, STEPHEN MAY, through undersigned counsel, requests that the jury be given the following RAJI jury instructions, and Special Instructions Nos. 1 and 2:

Standard Criminal	5	(Presumption of Innocence – Reasonable Doubt)
Standard Criminal	8	(Character and Reputation of Defendant)
Standard Criminal	16	(Evidence of Any Kind)
Standard Criminal	18	(Credibility of Witnesses)

Standard Criminal 21 (Indictment is Not Evidence)
Standard Criminal 25 (Expert Testimony)
Standard Criminal 34 (Testimony of Law Enforcement Officers)
Standard Criminal 36 (Defendant's Testimony)

Defendant also requests the following Special Jury Instructions:

Standard Criminal 15 (Defendant Need Not Testify) – AS MODIFIED
Standard Criminal 35 (Separate Counts) – AS MODIFIED
Defendant's Requested Special Jury Instruction No. 1
Defendant's Requested Special Jury Instruction No. 2
Defendant's Requested Special Jury Instruction No. 3

Defendant also requests the following Forms of Verdict, to be used for each count.

RESPECTFULLY SUBMITTED this 8th day of January, 2007.

PHILLIPS & ASSOCIATES, P.C.

By /s/ Joel Erik Thompson
Joel Erik Thompson
Chief Trial Attorney
for the Firm
Certified as a Specialist in Criminal Law
By the Arizona Board of Legal Specialization

A copy of the foregoing
hand-delivered the above
date to:

The Hon. Sherry Stephens
Judge of the Superior
Court

John Beatty, Esq.
Deputy Maricopa County
Attorney for Plaintiff

By /s/ [Illegible]

DEFENDANT'S REQUESTED SPECIAL JURY INSTRUCTION NO. 3

MOLESTATION OF A CHILD

The crime of molestation of a child requires proof beyond a reasonable doubt that the defendant intentionally or knowingly, and with the motivation of a sexual interest, directly or indirectly touched, fondled or manipulated, any part of the genitals or anus of a child under fifteen years of age.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. STEPHEN EDWARD MAY, Defendant.	COURT OF APPEALS DIVISION ONE NO. 1 CA-CR 07-0144 SUPERIOR COURT NO. CR 2006-030290- 001 SE

Mesa, Arizona
JANUARY 9, 2007

BEFORE: THE HONORABLE
SHERRY K. STEPHENS
Judge of the Superior Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Jury Trial)

REPORTED BY:
Dana D. Smith, RPR, CSR
Cert. No. 50566
Official Court Reporter

Prepared for Appeal

* * *

[70] Jury instructions. Let's go back in the chambers and do those. Do you want to bring your client or waive his presence?

MR. THOMPSON: We prefer to be with us.

One other question, and that is, there is indication that there may be difficulty bringing Detective

Quihuiz in. You indicated that you would permit a continuance for me to locate and get her here. I'm concerned about what that does with scheduling wise.

THE COURT: Mr. Beatty, do you have any detective back there to try to reach her to see if she is available?

MR. BEATTY: I don't. I have a phone number in my office, don't have it here. But I have her sergeant's phone number in my office.

THE COURT: Get those first and get my copies of the instructions and do those when you return.

MR. BEATTY: Thank you.

(Off the record 4:35 p.m. To 4:29 p.m.)

THE COURT: We're back on the record and discussing jury instructions.

Just to memorialize, we're going to remove character and representations of defendant as an instruction. Remove character and circumstantial evidence of six, all misconduct instruction.

The molestation of a child has been amended at the [71] request of defense counsel to read as follows: "The crime of molestation of a child requires proof that the defendant knowingly touched directly or indirectly the genitals of a child under the age of 15."

It's defense to child molesting. The defendant was not motivated by a sexual interest. The sexual

contact defense is omitted and the touching on clothing instruction is amended to read as follows: "In a prosecution for child molesting, the State need not prove that the defendant made direct contact with the genitals of the child, prove that the defendant touched the child's genital area through the child's outer clothing is sufficient."

The definition of genitals male will read private parts of a – sorry, genitals of a child of a male is penis, scrotum, testicles, and rectum. And genitals of female is female vagina, vulva, and rectum.

MR. THOMPSON: The rectum in both should be deleted.

THE COURT: Do you degree [sic].

MR. BEATTY: Yes, your Honor.

THE COURT: That's what I was asking earlier. All right.

MR. THOMPSON: Your Honor, if I could go back to the definition of molestation, I was under the impression that perhaps I didn't make my position clear or I didn't convince you, but my position is that the State is obliged to prove a [72] motivation of sexual interest as an element of the offense.

THE COURT: Right. And you're both going to bring me something to support your positions. Mr. Beatty wanted an opportunity to look at the 13-103 language and C and to provide some case law to the court on that issue. So with the exception of that part

of the molestation of a child instruction, do you agree with the instructions, Mr. Thompson?

MR. THOMPSON: Generally, and if I could make a short record on my position –

THE COURT: Sure.

MR. THOMPSON: – regarding the definition of molestation.

My reference is to the amended Senate Bill 1145, effective date April 24, '06, which, in effect, abolishes common law and affirmative defenses. In pertinent part, the amended Arizona Revised Statutes 13-103B states affirmative defense does not include any justification defense or defense that either denies an element of the offense charged or denies responsibility, including all by misidentification or lack of intent.

My view is that that establishes that there is no necessity remaining as there was under the previous circumstance where lack of intent would be an affirmative defense for the defendant to prove by a preponderance of the evidence that allegation. I believe that with the amendment to [73] the statute, the State is obliged to prove beyond a reasonable doubt that the defendant was motivated by sexual interest. I think that it is part of this obligation and part of the offense that's charged.

THE COURT: Okay. Mr. Beatty.

MR. BEATTY: I just wasn't aware that they were 1410, the statute that molestation had acquired

a new element, Judge. I need to call somebody. It certainly is not in my statute book there is a new element in that statute.

THE COURT: All right. I'll let you do that and talk about it tomorrow morning and try to start around ten o'clock if at all possible.

MR. BEATTY: I have got word that Investigator Quihuiz will be here at ten o'clock tomorrow.

THE COURT: Excellent, thank you.

(Whereupon, this proceeding was concluded at this time.)

[74] I, DANA D. SMITH, Official Court Reporter herein, do hereby certify that the foregoing pages are a true and correct transcript of the proceedings had in the above-entitled matter, all done to the best of my skill and ability.

DATED this 5th day of July, 2007.

/s/ _____
Official Court Reporter,
RPR, CSR No. 50566

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. STEPHEN EDWARD MAY, Defendant.	COURT OF APPEALS DIVISION ONE NO. 1 CA-CR 07-0144 SUPERIOR COURT NO. CR 2006-030290-001 SE

Mesa, Arizona
JANUARY 10, 2007

BEFORE: THE HONORABLE
SHERRY K. STEPHENS
Judge of the Superior Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Jury Trial)

REPORTED BY:

Dana D. Smith, RPR, CSR
Cert. No. 50566
Official Court Reporter

Prepared for Appeal

* * *

[99] THE COURT: I noted that one instruction missing is testimony that the defendant should be judged by the same standard as other witnesses. That needs to be added.

With respect to the issue – in terms of the child molestation instruction, I believe the instruction in

the packet is the appropriate one. I read Mr. Beatty's memoranda and received research from the Court's attorney. I believe that that instruction is appropriate. The issue, however, is whether, Mr. Thompson, you want the burden of proof instruction for affirmative defense that we discussed yesterday. You said yesterday that you did not want it.

MR. THOMPSON: I do not.

THE COURT: And you do not want it. So the record is clear, that instruction the defendant has raised is the affirmative defense of lack of sexual motivation with respect to the charges offenses, and you don't want that instruction; correct?

MR. THOMPSON: No.

MR. BEATTY: Judge, I also want to be clear on that too. That is the status of the law. If I happen to mention that in my closing, and then if Mr. Thompson tries to rebut that, I think it would be necessary to instruct them.

The broaching of the subject of an affirmative defense is on the defendant. The burden is on the defendant. Not just broach the subject, but prove it beyond a reasonable [100] doubt – or by a preponderance of the evidence.

Now, if I bring that up and I start arguing it, then he says no, that's not accurate, it's not here in the instructions, even though that is the correct status of the law. So I mean as long as we're not going

into that argument about burden of proof, that's fine. But –

THE COURT: Mr. Thompson, do you intend to argue that?

MR. THOMPSON: The problem is that we have a disagreement as to what the standard of proof is. I believe in a current state of 13-103, it is the State's burden to prove a lack of sexual motivation beyond a reasonable doubt.

MR. BEATTY: But that's not accurate of the law.

MR. THOMPSON: That's your position. I made my record.

MR. BEATTY: 13-205.

THE COURT: All right. Well, I have already ruled on that. So are you requesting that I give this instruction, Mr. Beatty?

MR. BEATTY: I think you should, Judge.

THE COURT: All right. Well, if you are going to be arguing lack of sexual motivation, which I believe you are.

MR. THOMPSON: Sure.

THE COURT: Then I'm going to give the instruction.

MR. THOMPSON: Okay.

THE COURT: You made your record that you object.

MR. THOMPSON: I made my record.

* * *

[167] I, DANA D. SMITH, Official Court Reporter herein, do hereby certify that the foregoing pages are a true and correct transcript of the proceedings had in the above-entitled matter, all done to the best of my skill and ability.

DATED this 9th day of July, 2007.

/s/ _____
Official Court Reporter,
RPR, CSR No. 50566

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Attorney for Plaintiff

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. STEPHEN EDWARD MAY (001), aka STEPHEN E. MAY, Defendant.	CR2006-030290-001 SE ___ STATE'S RESPONSE TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS (Filed Jan. 12, 2007) (Honorable Sherry K. Stephens)

The State of Arizona, pursuant to A.R.S. §§13-1407(E), 13-1410 and 13-103, requests this Court to deny in part defendant's proposed jury instructions.

In this criminal case charging the defendant with multiple counts of Molestation of a Child, the defense has requested a jury instruction that tries to modify

the elements of the crime. The defense requests the instruction to include the additional element that the State must prove the defendant was motivated by a sexual interest. That request is not supported by Arizona law and should be denied.

The issue of sexual motivation is accounted for in Arizona law by statute (A.R.S. §13-1407(E)). It is an affirmative defense that must be raised and proved by a preponderance of the evidence by the defendant prior to any requirement that the State address the issue. The jury should be instructed as to the proper state of Arizona law, not a misreading and misleading interpretation of the law.

This Response is supported by the attached Memorandum.

Submitted January ___, 2007.

ANDREW P. THOMAS
MARICOPA COUNTY
ATTORNEY

By: /s/_____
/s/ John Beatty
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

Thus far in the trial, the defendant has not proven the defendant's lack of sexual motivation by a preponderance of the evidence. While questions to

several witnesses have broached the idea that sexual motivation might be a factor in this trial, a preponderance of the evidence has *not* shown that the defendant had no sexual motivation.

The issue of the lack of sexual motivation normally arises in circumstances where a physician examines a child for medical reasons or a parent bathes a child. The circumstances in this case are wholly different, as described in prior filings and in the testimony in trial.

The defendant now requests a jury instruction regarding lack of sexual motivation. However, he is claiming that the issue is not an affirmative defense, but rather is now effectively an element of the crime of Molestation. The Court will note that, as of today's date, A.R.S. §13-1410 has not been modified since sometime prior to the time when the first allegations in this case were said to have been committed.

LEGAL ARGUMENT

1. STATUTES

A. A.R.S. §13-103

The defense references A.R.S. §13-103 as support for his two claims: 1) that the affirmative defense of lack of sexual motivation no longer exists, and 2) that the State must prove the additional element of motivation by sexual interest. That reliance is misplaced. Affirmative defenses are alive and well in Arizona law, as described in A.R.S. §§13-205 and 13-1407.

A.R.S. §13-103 was added to Arizona law when the law changed over in 1978 (Laws 1977, Ch. 142, § 39, eff. Oct. 1, 1978). The original version abolished all common-law offenses, unless they were codified by statute or ordinance under the new Arizona legal system.

The statute was then amended 20 years later, on April 22, 1997 (Laws 1997, Ch. 136, §3), by adding the abolishment of common-law affirmative defenses. The language of that paragraph specifically excludes from abolishment any affirmative defense denying an element or denying responsibility (intent). In other words, any affirmative defense arguing lack of sexual motivation was not abolished by the 1997 amendment.

The statute was amended again in 2006 (Laws 2006, Ch. 199, §1, eff. Apr. 24, 2006). The effect of this amendment was to add to the specific exclusions from the definition of "affirmative defense." The additional exclusion in this amendment was justification under Chapter 4. Thus, the 2006 amendment is absolutely irrelevant to the case at bar.

B. A.R.S. §13-205

However, A.R.S. §13-205 was also amended by the 2006 Amendment. 13-205 is the affirmative defense statute, establishing the defendant's burden of proof. That statute was not eliminated, but only modified to erase the justification portion. The remainder of the statute remains in effect.

2. CASELAW

A. State v. Grell, 212 Ariz. 516, 135 P.3d 696 (2006)

In the *Grell* case, the defendant, not the State, was required to prove mental retardation. The burden of proof was likened to the burden of proof required for affirmative defenses. The Arizona court recognized that the U.S. "Supreme Court has held that a state may require that the defendant prove affirmative defenses [citations omitted]." (212 Ariz. at 522, 135 P.3d at 702.)

B. Garcia v. Browning, 213 Ariz. 598, 146 P.3d 1007 (App., Div. 2, 2006) (review granted Oct 23, 2006)

In *Garcia*, the Arizona Court of Appeals recognized the new amendment regarding affirmative defenses. However, that case dealt with a justification defense under Chapter 4, not the affirmative defense in 13-1407(E).

C. State v. Casey, 205 Ariz. 359, 71 P.3d 351 (2003) (cert. denied, 540 U.S. 1079)

In *Casey*, the Court discussed the issue of justification (specifically self-defense) as an affirmative defense that the defendant must prove by a preponderance of the evidence. The Court recognized that

the affirmative defense was *not* an element of the crime.

D. State v. Sanderson, 182 Ariz. 534, 898 P.2d 483 (App., Div. I, 1995) (review denied 1995)

In *Sanderson*, the defendant was accused of child molestation after the child said, *inter alia*, the defendant had touched her between the legs while sitting on the defendant's lap. The defendant argued that the statutes regarding his charges impermissibly shifted the burden because they required him to disprove an element of the charges (182 Ariz. at 541, 898 P.2d at 490). The Court found that the applicable statutes "created an affirmative defense regarding motive. This is constitutionally permissible [citations omitted]." (182 Ariz. at 542, 898 P.2d at 491). On the same page of the opinion, the Court went on to deny the argument that sexual motivation is an element of Molestation of a Child:

> We likewise reject the suggestion that the statutes, which contain no reference at all to a presumption, nevertheless create a presumption on the "element" of motivation by sexual interest. . . . Contrary to the defendant's implication, proving the existence of such motivation was not necessary to establish guilt of child molestation under the statute at issue [citations omitted].

CONCLUSION:

The defendant's relevant suggested forms of jury instruction are inappropriate and contrary to law. There is no element in the crime of child molestation regarding sexual motivation. Affirmative defenses are still viable in Arizona law; lack of sexual motivation is one of those defenses. The defendant constitutionally carries the burden of proving lack of sexual motivation by a preponderance of the evidence.

The requested jury instructions on this issue should be denied.

Submitted January ___, 2007.

ANDREW P. THOMAS
MARICOPA COUNTY
ATTORNEY

By: /s/ _____
/s/ John Beatty
Deputy County Attorney

Copy mailed\delivered
January ___, 2007, to:

The Honorable Sherry K. Stephens
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IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA
CRIMINAL DIVISION

STATE OF ARIZONA, Plaintiff, v. STEPHEN MAY, Defendant.	)	CR 2006-030290-001-SE FINAL INSTRUCTIONS (Filed Jan. 10, 2007)

* * *

MOLESTATION OF A CHILD

The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of fifteen years. It is a defense to child molestation that the defendant was not motivated by a sexual interest.

AFFIRMATIVE DEFENSE

The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of molestation of a child. The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack

of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence you must find the defendant not guilty of the offense of molestation of a child.